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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-376

.....

LAKESIDE BRIDGE & STEEL CO.,

Petitioner,

v.

MOUNTAIN STATE CONSTRUCTION CO., INC.,

Respondent.

.....

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

.....

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Respondent's statement of the question presented misleadingly creates the impression that petitioner selected from among several of its plants and chose at its option to fabricate in and ship from the forum state the $1,281,750.00 worth of custom fabricated, specially designed steel components involved in this action.

To flesh out this impression, respondent asserts that it "had no knowledge or information as to where the components were to be manufactured and assembled" and that "[t]here is no indication anywhere in the record that respondent knew or

cared where the materials ordered were manufactured." (Brief in Opp., pp. 4,9) These assertions are not supported by the record.[1]

While respondent correctly notes that petitioner's principal office is in Milwaukee, Wisconsin, nowhere does respondent state, as was pointed out in the petition (p.5), that the record establishes that petitioner has no place of business, [plant], employees or agents resident or officed in any state other than Wisconsin. (Hauf Aff., ¶2) Petitioner's quotation, which was delivered to respondent in West Virginia, bore the Milwaukee address of petitioner's sole place of business, provided for shipment f.o.b. *Seller's Milwaukee Plant* and provided that Wisconsin law would apply. Respondent's subsequent purchase order for the bid items manufactured by petitioner, which incorporated the terms of the quotation by reference with the language "per your quotation," was undisputedly mailed by respondent to petitioner at its sole place of business in Milwaukee.

The import of the contract term "FOB Seller's Plant Milwaukee, Wisconsin with freight allowed to rail siding nearest project site" is that it not only establishes from where the parties contemplated shipment would be made but also evidences respondent's awareness that petitioner's *plant* was located in Milwaukee, Wisconsin.

Respondent, like the court below, ignores all of the foregoing and presents the view that, in addition to interstate acts by mail and telephone, coupled with the inducement of substantial activity within the forum and the express invocation of the law

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[1] Note that in its Brief in Opposition (p.4), respondent states that the affidavit of its president "establishes without contradiction that [respondent] has not entered into contracts to be performed in Wisconsin[.]" In fact, this affidavit states only "[T]hat defendant, . . . has entered into no contracts to be performed *by it* within the State of Wisconsin[.]" (Emphasis added) (Lewis Aff., pp. 1-2)

of the forum, the constitutional assertion of jurisdiction requires specific physical activity and presence *of the defendant* within the forum. That is not the law as established by this Court! (See petition, pp. 19-21)

It is presumably only in this narrow context that respondent says that this case involves a defendant "having no contacts" with the forum state. Respondent cannot otherwise accurately state that "[n]owhere in the record is there any suggestion that Mountain State at any time had any contact with the State of Wisconsin." (Brief in Opp., p. 5) Such assertions are belied by respondent's own efforts to demonstrate the insufficiency of those contacts with the forum which in fact are present and which the court below itself addressed.[2]

While respondent has restated what it would like to be the operative facts and ignored the forum contacts relied upon by petitioner, the importance and substantiality of the question presented in the petition, the conflict with the decisions of the highest court of the forum state and the conflict with the decisions of the highest courts of other states are not denied or disputed in respondent's response. Respondent even concedes that reconciliation of the decided cases is difficult. Regarding the conflict among the federal Courts of Appeals, respondent merely concludes that full analysis would serve "no helpful purpose."

With the exception of an effort to distinguish the cases addressed below, respondent attempts no analysis whatsoever.

As to the first case respondent attempts to distinguish, *Electro-Craft v. Maxwell Electronics Corp.*, 417 F.2d 365 (8th

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[2] This mischaracterization explains respondent's reliance upon the following sentence from *International Shoe* italicized at page 9 of its brief: "[The due process clause] does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has *no contacts, ties or relations.*" (emphasis added)

Cir. 1969), the court below, unlike respondent, clearly and correctly did not view the case distinguishable, either on the basis suggested by respondent or on any other basis. The resident buyer — resident seller distinction to which respondent refers was fashioned by the Minnesota state courts as a consideration bearing only on the state law question of whether the Minnesota long-arm statute applies to a given transaction. Since this distinction has not been recognized or accorded any significance by the Wisconsin courts in determining the application of Wisconsin's long-arm statute, there was no reason for the court below to make any reference to it. In *Electro-Craft,* the court appropriately notes it in dealing with the state law question. The court *then* "turn[ed] to the due process question," *Id.* at 368, for the remainder of its decision and made no further reference to it.

Respondent next attempts to distinguish *In-Flight Devices Corp. v. Van Dusen Air, Inc.,* 466 F.2d 220 (6th Cir. 1972), which the Seventh Circuit has previously cited with approval in *Spiegel, Inc. v. F.T.C.,* 540 F.2d 287, 291 (7th Cir. 1976). In doing so, respondent relies on the fact that in *Van Dusen* defendant inspected production facilities in the forum and otherwise had "many contacts" not present here. However, contrary to respondent's implication, the defendant's inspection of plaintiff's production facilities in the forum state was not identified by the *Van Dusen* court as a key factor in its analysis and holding.[3] Respondent does not identify the other "many con-

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[3] The decision below has already been read and applied in a manner which would render this purported distinction immaterial. In at least three subsequent district court decisions involving facts similar to those present here it was held, with reliance on the decision below, that personal jurisdiction could not constitutionally be sustained despite the fact that the respective defendants had made forays into the forum to inspect production facilities, to negotiate the contract or to review contract specifications. *Wisconsin Electrical Manufacturing Co. v. Pennant Products,* 472 F.Supp. 855, 858 (E.D. Wis. 1979); *Met-L-Wood Corp. v. Lifetime Pools, Inc.,* 475 F.Supp. 149, 152 (N.D. Ill. 1979); and *W. A. Krueger Co. v. Ottenheimer Publishers, Inc.,* No. 78-C-322, slip. op. at 2-3 (E.D. Wis. October 17, 1979).

tacts" which it says were present in *Van Dusen* but are not present here; but they are undoubtedly those on which the Sixth Circuit expressly noted that it was not relying in reaching its decision. 446 F.2d at 235 n. 26.

Respondent then notes the difference between the type of transaction involved in this case and that involved in *O'Hare International Bank v. Hampton,* 437 F.2d 1173 (7th Cir. 1971). However, as pointed out in the petition (p. 18), this difference does not explain the fundamental conflict inherent in the fact that jurisdictional contacts (namely, that the agreement specified that the law of the forum would govern and that performance occurred or was to occur in the forum) deemed sufficient in *O'Hare* were deemed insufficient in the decision below.[4]

Respondent does not dispute petitioner's contention that the court below acted contrary to *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). Rather respondent speculates, contrary to the tenor of the opinion below and the Wisconsin cases cited in the petition, that the outcome would not have been different if the court had followed state law. The court below, in holding contrary to Wisconsin case law that the contract for services provisions of the Wisconsin long-arm statute did not apply, expressed the view that a contract for services is different from a contract for the sale of goods at least "from the standpoint of . . . the 'balancing of inconveniences[.]'" (Petition A. 5) The services in fact performed by petitioner in Wisconsin over the course of many months, but disregarded by the court below, included customized fabrication and plant assembly of the goods by petitioner as well as plant inspection of the goods by both petitioner and the owner who bought the components from respondent and contracted with and through respondent for that activity to be performed in the Wisconsin plant.

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[4] Judge Pell who wrote the decision in *O'Hare* did not write the decision in this case, as respondent erroneously states.

The court's failure to consider such services had, or certainly ought to have had, an impact on its assessment of the quality and nature of the contacts, ties and relations which respondent had with the forum and petitioner. Furthermore, because of this erroneous approach by the court below, three and not just one of the bases for jurisdiction deemed constitutionally sufficient by the Wisconsin legislature and held to be sufficient by the Wisconsin Supreme Court have been constitutionally impugned.

The position of both respondent and the court below is apparently based in part upon the fact that the contract did not expressly require performance in Wisconsin. Therefore, whether the performance by the plaintiff in the forum must be *expressly required* by the contract or whether it is enough that the defendant knew, contemplated or *believed that it would occur there* is among those issues which this Court should address both to resolve the conflict in the decisions and to afford much needed guidance to our courts.[5]

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[5] In the cases cited in note 3 *supra,* the contracts involved did not require performance in the forum. On the basis of the decision below, jurisdiction was not sustained despite the fact that in each case the district court found that the defendant knew, was aware or must have assumed that performance was to occur in the forum.

See *Biltmoor Moving and Storage Co. v. Shell Oil Co.*, 606 F.2d 202, 207 (7th Cir. 1979), where the Seventh Circuit recently said, in a case in which it found this distinction "immaterial" because the contract involved "absolutely required performance" in the forum: "Illinois courts have not always distinguished between situations where the contract requires performance in Illinois and situations where, although the contract is silent, the defendant knows in advance that performance will take place in Illinois."

The response to the petition substantially confirms its merit. The need for this Court's review of the decision below is manifest.

Respectfully submitted,

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